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A cursory glance on the Hungarian administrative justice system after two main reform attempts[2]

Introduction

During the recent years, the Hungarian government initiated two main reform processes of the administrative justice system, which brought this issue at the core of the political and constitutional discussion in the country. Several contributions expressed diverse views about the preferred future of this branch of the judiciary, and a series of political decisions influenced its internal structure, and daily functioning. Our study aims to provide a brief, and concentrated summary of these endeavours and the conflicting approaches, and try to draw those conclusions of this discourse, which may orient the perspectives of Hungarian administrative justice regardless of which model we favour. Therefore, we aim to outline the main governmental and oppositional arguments also, and focus on the impact of populism to administrative justice. Since the reorganisation of the judiciary is a commonly fostered target of populist governments around Europe, we are convinced, that our considerations might be relevant not only for Hungary, but also for those foreign countries, which also deal with the review of their judicial system, with special regard to administrative justice.

1. Some general points about the administrative justice

Historically, administrative justice can follow two main forms: monistic or dualistic. In a monist system, ordinary courts deal with administrative matters, in which case the state is treated as a private individual. There are different solutions in the dualistic model, but one

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thing that is common that all administrative matters is dealt with by separated administrative courts.[3]

Obviously, there are exceptions and hardly categorizable countries which nonetheless can be put on a scale between the theoretic models. Aiming to create a finer categorization, we can recognize dualistic, imperfect dualistic, imperfect monistic and monistic systems. France, and certain southern European countries, like Greece and Portugal follows the dualistic model, and has a separate administrative court system, which rules over all administrative matters. The imperfect dualistic countries also have separate courts with jurisdiction in most administrative cases, but certain cases generally seen as administrative matters are ruled by ordinary courts. Countries like Germany, Austria, the Netherlands and some Scandinavian states follows this route. A separate group of countries in which legal remedy against the administrative decisions is primarily the responsibility of the ordinary courts, forms the imperfect monist group. However, in these systems the ordinary courts did not initially have the possibility to annul administrative decisions, an administrative judiciary emerged which took over certain powers from the ordinary courts. This has created a mixed system, which exists in Belgium and Luxembourg. The last category is the monistic one, where the ordinary courts decide in every administrative case. This group consist the United Kingdom, Norway, and Denmark.[4]

The dividing line between the dualist and the monist model is now very thin. Bo(creating special administrative courts or keeping administrative cases within the remit of ordinary courts) are legitimate, and each has its pros and cons, with their evaluation depending largely on the context of the national court system. It's a sovereign decision of any state's legislature to create a distinct administrative court system. In the next section, this paper briefly presents the development of the Hungarian judicial system, with special regard to the establishment and development of administrative judiciary.

[3] László Trócsányi ifj. (1988): A közigazgatási bíráskodás szervezete és működése az egyes európai országokban. A jogintézmény elméleti alapjai és működési tapasztalatai, valamint egyes európai országok közigazgatási bíráskodására vonatkozó jogszabályok. [The organisation and functioning of the administrative justice in the different European countries. The theoretic principles, and the experience of this legal instrument, and certain laws on administrative justice in Europe.] Budapest, mta. 182.

[4] Marianna FAZEKAS (ed), *Közigazgatási jog, Általános rész III. [Administrativelaw III.]* (ELTE Eötvös, 2nd edn, 2019) 324-327.

2. The history and evolution of the Hungarian administrative justice system

In Hungary, simultaneously with the separation of public administration and courts, the issue of administrative judiciary arose at the second half of the XIX. century.[5] After a long preparation, under the pressure of the king, in 1883 the organization and rules of procedure of financial judiciary were first established and then further developed by the legislature into general administrative judiciary.[6] Not only organizationally, but also procedurally, a very mixed system has emerged: the only forum, the Royal Hungarian Administrative Court, has exercised a general power of changing the administrative decisions and thus was vested with very strong competences.[7]

Following the abolition of the Administrative Court in 1949,[8] administrative justice continued to exist within the ordinary courts in an extremely narrow range. The Soviet-style communist dictatorship regarded the rule of law as a particularly negative phenomenon. In this line of thought, the judicial control of state organs was an irregular and undemocratic concept, which was supposed to be in conflict with the supremacy of the popular will.[9] However, the total denial of judicial control of state power was short lived. The Procedural Act (Et.), which regulates administrative procedures and was enacted in 1957, re-institutionalized the judicial appeal of public administration decisions as an extraordinary form of legal remedy - but in practice this opportunity prevailed only in a very limited circle.

Until 1991, the possibility of judicial review of administrative decisions was the exception rather than the general rule.[10] However, in 1991 - after the fall of the communist regime - the Constitutional Court stated that all administrative decisions should be subject to a judicial remedy (control).[11] After 1991, a four-level judicial organization was gradually established.

[5] Andor Csizmadia – Sándor Karcsai (1946): Magyarország közigazgatása. [The public administration of Hungary.] budapest, budapest székesfőváros irodalmi és művészeti intézet. 164–165.

[6] János Martonyi id. (1947): az ötvenéves közigazgatási bíróság. [The fifty years of the Administrative Tribunal.] Városi Szemle, 33. évf. 3–4. sz. 187–201.

[7] Albin Márffy (1947): A Magyar Közigazgatási Bíróság 50 éve: 1897–1947. [Fifty years of the Hungarian Administrative Tribunal: 1897-1947.] Budapest, máté Ny. 227.

[8] Ferenc Sik (1984): a közigazgatási bíróság alkonya. 1945–1949. [The last years of the administrative tribunal: 1945-1949.] Jogtudományi Közlöny, 39. évf. 8. sz. 453–458.

[9] Péter Nagy: A KÖZIGAZGATÁSI BÍRÁSKODÁS IRODALMA 1945 UTÁN. "The Literature of the Administrative Jurisdiction from 1945." Pro PubliCo boNo – magyar közigazgatás, 2018/3, 188–215.

[10] Albert Takács (1987): a közigazgatási bírósági jogvédelem rendszere. [The system of the administrative justice as an instrument for the protection of fundamental rights.] Jogtudományi Közlöny, 42. évf. 12. sz. 675–677.

[11] András Bencsik, 'A jogállam és a közigazgatás néhány összefüggése – különös tekintettel a közigazgatási bíráskodásra'[Certain connections between rule of law and the administration – special regard to administrative judiciary] In Smuk Péter (ed): *A jogállamiság 20 éve*[20 years of rule of law](Széchenyi István Egyetem 2009) 138–144;

The lower level of the organization was the local court with general jurisdiction in criminal and civil matters. The local court is called "district court" or "municipal court", depending on its location. The second level of the judicial hierarchy was the county court. The jurisdiction of each county court extended to the counties. The county court dealt with appeals against the decisions of the municipal court and it was the court of second instance against labor court decisions.

The Court of Appeals was primarily the third level in the judicial hierarchy as an appellate court. In administrative cases the Court of Appeal in Budapest had exclusive jurisdiction to hear the appeal in administrative cases. The Supreme Court was the supreme judicial body of the Republic of Hungary, as it was the forum of last resort of appeals.

After 2012 administrative and labour tribunals were set up at local court level.[12] These courts were responsible for the judicial supervision of administrative decisions and rule on cases concerning labour relations. As it wasmentioned earlier, up to 31 December 2012, these cases were judged at first instance by local courts and labour tribunals.

As part of the reform, the name of each court level was changed, restoring the unity of the historical court names. Instead of the Supreme Court, the Constitution again called the Supreme Court the Curia, a court of justice instead of country court, district court instead of Municipal / City court. In any case, the most important change affecting the judiciary was the establishment of administrative courts "in the same department as the labor courts"- it was not a separate body from the judiciary system.[13]So, Hungary already had and and still has a system of judicial review of administrative decisions within the framework of the court system.

3. The first attempt to reorganise the administrative justice system (2016-2017)

The first attempt to reform the system was in 2016, when the Government had announced its intention to set up a new branch of judiciaryfor handling administrative cases separately by a

[12] András Bencsik: A közigazgatási bíráskodás helyzete és jövője – az új Alaptörvény tükrében. [The present and the perspectives of administrative justice - in the light of the new Fundamental Law of Hungary.] In: Varga Norbert (szerk.): Az új Alaptörvény és a jogélet reformja. Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2013. 35–45.

[13]Herbert Küpper, *'Magyarország átalakuló közigazgatási bíráskodása'* [The changing system of administrative judiciary in Hungary] (2014 MTA Law Working Papers) 31 <https://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf>accessed 21 June 2020

distinct, high administrative court and changed the laws accordingly.[14] The government has secretly prepared a bill that would bring significant changes to the organisation of administrative justice. Instead of administrative and labor tribunals, regionally-based administrative courts would review most of the administrative decisions at first instance, while the newly created Supreme Administrative Court would rule on priority cases and second instance.[15] Read in conjunction with the draft of the Administrative Procedure Code, the Curia would have very limited powers in administrative matters. The bills, which would otherwise require a two-thirds majority, have been prepared in complete secrecy: the draft has not been published on the Government's website, nor has there been any substantive professional and social debate. Based on government practice so far, this in itself raised the question of whether only the idea of administrative court really floated before the government's eyes during the preparation, or whether some saw the opportunity to dominate the courts with this proposal.[16]In January 2017, the Constitutional Court decided that such a change would require an amendment of the Constitution, but without constitutional majority the government had no means to amend the constitution.[17]

4. The second attempt to reorganise the administrative justice system (2018-2020)

4.1. The package adopted in October 2018, and its preparation

As we have seen, the first stage of the administrative justice reform failed due to the lack of necessary two-third parliamentary majority behind the government. However, the government retained its intent to establish a revised system of administrative courts, since it still hold the former arguments valid and compelling to restructure the existing model.[18] After the legislative elections in April 2018, the FIDESZ/KDNP obtained again more than two-third of the parliamentary seats, and the Fundamental Law of Hungary was amended to provide constitutional basis for a separate judicial branch of administrative matters.[19] The minister of

[14]Act on the administrative procedure, enacted in 6 December 2016, but due to the annulment by the Constitutional Court, it never came into effect

[15] Bartha Ildikó: Eljárási kódex vagy szervezeti reform? Vita és döntés a közigazgatási bíráskodásról. [Procedural code, or organisational reform? Discussion and decision on the administrative justice.] Magyar Tudomány, 2017. 178. évf. 9. sz. 1084–1087. o.

[16]Tordai Csaba, 'A közigazgatási bíráskodásról' [About the administrative judiciary] (*Így írnánk mi, Átlátszó* 13 September 2016) <https://igyirnankmi.atlatszo.hu/2016/08/31/a-kozigazgatasi-biraskodasrol/>accessed 12 June 2020

[17]decision 1/2017. (I. 17.) AB [ruling of theConstitutionalCourt of Hungary]

[18]BALOGH Zsolt: „Harmincéves a közigazgatási bíráskodás" [The administrativejustice is thirtyyears old] In: BARTÓK Flóra etal. (ed.): *Tanulmánykötet a Kúria Közigazgatási Szakágában 2019-ben ítélkező bírák tollából* [Contributionsfromjudgesontheadministrativebranch of theCuria] Wareg Hungary Kft., Budapest, 2019. 9-23.

[19]Seventh Amendment of theFundamental Law of Hungary, Art. 7.

justice announced almost immediately, that the administrative justice reform will be put back to the agenda, and the relevant laws will be adopted before the end of 2018.

The minister set up an advisory body from well-acknowledged experts of the topic, and from highly qualified lawyers, who followed and monitored the drafting process of the new package. It remained constantly controversial, whether the preparation of the relevant bills was sufficiently inclusive and transparent. The governmental sources highlighted, that a long-term professional discussion took place about the matter of administrative justice, and the opinion of the advisory body was requested and considered about each proposal. By contrast, according to the oppositional views, this second stage of the reform was again prepared almost secretly, without convincing justification, and most of the stakeholders, including the administrative judges had only a limited access to the relevant information.[20]

Surrounded by several demonstrations and intense political and professional debate, the laws on the new administrative system were enacted by the Parliament in December 2018, and envisaged a separate supreme administrative court on the top of the separate administrative justice system, distinguished from the Curia, the highest judicial body of Hungary. This court shall have been established in Esztergom,[21]in one of the historical capitals of Hungary around 30 miles from Budapest, close to the Danube and the Slovakian border. Apart from the separate high administrative court, several administrative tribunals would have been created across the country, and the new bodies would have been broad competences to hear a wide range of sensible cases.[22]As part of this project, the whole legal framework for administrative cases: new act on general administrative procedure;[23] and on administrative court procedures[24] have been also passed.[25]

The new act on administrative courts brought novelties in three main areas. Firstly, the structural independence of the administrative court was concerned,[26]as the new act would

[20]VENICECOMMISSION: *Hungary - Opinionon the law on administrative courts and on the law on the entry into force of the law on administrative courts and certain transitional rules*Opinion no. 943/2018, 16. March 2019. 30-31. §.<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e>
[21]Act CXXX. of 2018 in Hungary on the administrative tribunals 2. §.
[22]KOVÁCS András György: „A közigazgatási bíráskodás fejlődése és mai helyzete – utak és kérdőjelek" [The development and the current situation of the administrative justice- directions, and uncertainties] In: BARTÓK Flóra: *Contributions*, 87-98.
[23]Act CL. of 2016. in Hungary on the code of general administrative procedure.
[24]Act I. of 2017. in Hungary on the code of general administrative court procedures.
[25]ROTHERMEL Erika: „Néhány gondolat a közigazgatási perrendtartás előzményei, előkészítése és megalkotása köréből" [Some points on the previews, preparation, and enactment of the general act on administrative procedures] In: BARTÓK Flóra: *Contributions*, 166-177. (cited above fn.: 7).
[26]SPERKA Kálmán: „Alternateti tle: Quo Vadis Administrative Jurisdiction? Challenges Connected to the Reform of the Structure of the Administrative Courts" *Acta Humana*(2019): 123-139.

have authorized the minister of justice to decide on the appointment of judges,[27] on their promotion and honours,[28]and he/she could approve the organizational and operational rules of the administrative courts.[29]The supporters of these ideas consider these competences as limited ones, which are surrounded by the effective participation of judicial self-government bodies in these decision-making processes.[30]This solution is also in compliance with foreign examples within the European Union,[31] for instance, Austria and Bavaria provide broader margin of decision for the minister of justice over the administrative courts.[32] Moreover, according to this line of argumentation, the ministerial supervision with restricted scope would ensure the most fruitful functioning of the administrative courts.[33]However, the opposants saw a main thread of judicial integrity in these measures,[34]and considered them as incompatible with rule of law.[35] It is beyond doubt that the judicial self-government bodies provide opinions before the ministerial decisions, but this could not serve as a proper counterbalance of the overstrong position of the executive.[36]Apart from this, the internal independence of each judge is also at least questionable due to the prerogatives provided for the leaders of the administrative courts.[37]Furthermore, administrative justice constituted a well-functioning system in Hungary,[38]therefore, it was not worthy to reorganise it at all.[39]

Secondly, the staff of the administrative courts would have been changed remarkably by the envisaged reform. Those, who have dealt with administrative cases as judges could request the prolongment of their status as administrative judge. However, other persons, who comply with the requirements set for judges could also submit an application for a position of administrative judge, which shall have been assessed in the first instance by a body composed by judicial members and other experts. Nevertheless, the minister of justice would have had

[27]Act CXXX. of 2018. in Hungary on the administrative tribunals 25. §.
[28]Act CXXX. of 2018. in Hungary on the administrative tribunals 38-39. §.
[29]Act CXXX. of 2018. in Hungary on the administrative tribunals 34. § (4)-(6).
[30]Act CXXX. of 2018. in Hungary on the administrative tribunals 25. §.
[31] Péter Nagy, KÜLFÖLDI MINTÁK ÉS FŐBB IRODALMUK A MAGYAR KÖZIGAZGATÁSI BÍRÁSKODÁS SZAKIRODALMÁBAN. "Foreign samples of administrative justice and their main literature in Hungary." PrO PUBLICO BONO – Magyar Közigazgatás, 2018/4, 114–151.
[32]VENICECOMMISSION: Opinion no. 943/2018. 26-29. and 36. §. (cited above, fn: 9).
[33]Official explanation attached to Act CXXX. of 2018. in Hungary on the administrative courts.
[34]VENICECOMMISSION: Opinion no. 943/2018. 49-57. §. (cited above, fn: 9).
[35]VENICECOMMISSION: Opinion no. 943/2018. 47. §. (citedabove, fn: 9).
[36]VENICECOMMISSION: Opinion no. 943/2018. 39-41. §. (cited above, fn: 9).
[37]VENICECOMMISSION: Opinion no. 943/2018. 98-108. §. (cited above, fn: 9).
[38]BENCZE Mátyás, BADÓ Attila: *Quality of justice in Hungary in European context* http://real.mtak.hu/74097/1/badbenczefrum.pdf
[39]KOVÁCS András, BARABÁS Gergely: „Why Judicial Independence Matters? Administrative Judiciary: the Transmission Point Between National and EU Law" *ELTE Law Journal* 2018/2. https://eltelawjournal.hu/why-judicial-independence-matters-administrative-judiciary-the-transmission-point-between-national-and-eu-law/accessed 10 May 2020

the competence to review the outcome of this evaluation, and award the position without justification to a candidate other than the person, who achieved the most points.[40]The drafters aimed to promote professionalization of the administrative justice by providing equal opportunities for each candidate,[41] and to secure such an administrative court system, which is composed by judges with diverse background.[42] The minister has only a limited margin of movement, and his decision shall be mainly grounded on the judicial assessment of each application.[43]The counterarguments include the new attitude of judges, who will arrive from the public administration, and they would have brought a pro-governmental approach, and without any judicial experience, the instincts of an inherently hierarchic surrounding.[44]These circumstances at least question their ability to behave as independent judges in cases about politically sensitive matters, such as elections, referenda, taxes, public procurement, competition law and misuse of police powers.[45]

Thirdly, the external influences of the impugned measures would be also considerable. The pro-governmental sources expected more transparent remedies, more foreseeable judgements,[46]faster and more efficient judicial review of administrative decisions,[47]and also the respect of historical traditions dated back to the first half of the XX. century.[48]Against these points, the often-rumoured negative consequences were the undermined credibility of the administrative courts, and legal uncertainty and unpredictability for private stakeholders. Due to these concerns, economic actors will be more reluctant to invest in Hungary, which would have lead to severe economic difficulties, and this would increase the vulnerability of the citizens from the state.[49]

[40]Act CXXX. of 2018. on the administrative courts, 67-72.
[41]Official explanation attached to act CXXX. of 2018. in Hungary ontheadministrativecourts.
[42]VENICECOMMISSION: Opinion no. 943/2018. 30-34. §. (cited above, fn: 9).
[43]TRÓCSÁNYI László: „A rendszerváltoztatás mostohagyermeke: révbe ér, avagy az önálló közigazgatási bíráskodás megteremtéséhez vezető jogalkotói út" [The stepchild of the democratic transition: it succeed, or the legislative path for the introduction of the separate administrative courts]*Acta Humana* 2019/1. 7–22. https://folyoiratok.uni-nke.hu/document/nkeszolgaltato-uni-nke-hu/WEB-Acta_Humana_2019_1_01_T_Trocsanyi.pdf
[44] Most Pressing Issues of the Hungarian Law on Administrative Courts and Relevant International Standards For the Venice Commission regarding its visit to Budapest on 4-5 February2019. https://www.helsinki.hu/wp-content/uploads/HHC_VC_Prep_doc_4_5_Febr_2019-FINAL.pdf
[45]VENICECOMMISSION: Opinion no. 943/2018. 13. §. (cited above, fn: 9).
[46]Official explanation attached to act CXXX. of 2018. in Hungary on the administrative courts.
[47]TRÓCSÁNYI László: The stepchild of the democratic transition, 7–22. (cited above, fn.: 25).
[48]Official explanation attached to Act CXXX. of 2018. in Hungary on the administrative courts.
[49] Most Pressing Issues of the Hungarian Law on Administrative Courts and Relevant International Standards For the Venice Commission regarding its visit to Budapest on 4-5 February 2019. https://www.helsinki.hu/wp-content/uploads/HHC_VC_Prep_doc_4_5_Febr_2019-FINAL.pdf

Due to the high number of controversial issues, and the strong criticism even from domestic and international stakeholders, the government prepared a second package, which introduced several amendments on the original plans.

4.2. Amendments in March 2019.

The Venice Commission had announced that it was examining the recent Hungarian development in administrative justice, and it would issue an opinion from the adopted acts. However, the Hungarian government submitted to the Parliament the bill to amend the original version of the administrative justice before the publication of this opinion, or before consulting with the representatives of the Venice Commission about their views. Amongst others, the amendment prescribed the possibility of judicial review on the ministerial decision from appointing administrative judges, however only for those, who would have been nominated after 1 January 2020.[50]The critical voices highlighted, that half of the judges would have been appointed by the minister during 2019. and these judges will assess the applications during the later stages.[51]The amendment also strengthened the judicial self-governance by safeguarding the independence of the national administrative judicial council members,[52] and also by removing the ministerial power to approve the organizational and operational rules of the administrative tribunals.[53]The competences of the national administrative justice council remained the same as according to the earlier version, so the opposants still hold the weight of the judicial self-government bodies insufficient to counterbalance the power of the minister, as the amendment of the planned reform package has not satisfied the expectations of several professional and political stakeholders. The acts on the administrative justice reform were contested before the Constitutional Court, which issued a ruling from this matter in June 2019. and found the new system of administrative justice in compliance with the Fundamental Law of Hungary.

4.3. The ruling of the Constitutional Court in June 2019.

[50]Act XXIV. of 2019. in Hungary on further safeguards of the independent administrative tribunals, 12-14. §.
[51]VENICECOMMISSION: Opinion no. 943/2018. 66-77. §. (cited above, fn: 9).
[52]Act CXXX. of 2018. in Hungary ontheadministrativetribunals 28. §.
[53]Act XXIV. of 2019. in Hungary on further safeguards of the independent administrative tribunals 5. §.

As the first reform of the administrative justice, the second proposal was also referred to the constitutional Court by oppositional members of the Parliament, as they alleged its conflict with rule of law. The Constitutional Court concluded that thelead time was appropriate for the stakeholders, since the act on the administrative justice reform was adopted in October 2018, and its entry into force had been due on 1 January 2020. Even the amendments had been passed in March 2019, almost ten months before the expected establishment of the separate branch of administrative justice,[54] which could not be interpreted as an extremely short time for preparation.

After having considered this, the Constitutional Court focused on the separation of powers aspect, and taken into account the ministerial powers over the administrative tribunals. The body acknowledged, that the legislation has a broad margin of movement to determine the operation of administrative tribunals,[55] the ministerial participation at the guidance of these entities itself does not violate any constitutional principle, or specific provision.[56]However, the minister shall not interfere to the judicial activities themselves, as this would undermine the independence of the courts.[57] Nevertheless, the administration of the courts constitute an administrative task committed to the executive.[58]

The reasoning highlighted, that the National Administrative Justice Council would have been a proper counterbalance of the ministerial pressure, as the majority of this body would have been judges, and its powers would be sufficient to outweigh the involvement of the minister.[59]The nomination process of the judges was also found constitutional as the judicial self-governing bodies play an effective role in the assessment of the applications. 80 % of the points awarded by the advisory body are grounded on objective criterion, so subjective grounds are just complementary elements of the system. The rules on the selection process are provided by law, and these provisions do not west the executive with undue influence on the final decisions, which are also subject to legal remedies.[60] The active participation of the judicial self-governing bodies is also necessary for exercising the budgetary competences of

[54]decision 22/2019. (VII. 5.) AB 41-53.
[55]decision 22/2019. (VII. 5.) AB 111.
[56]decision 22/2019. (VII. 5.) AB 65.
[57]decision22/2019. (VII. 5.) AB 66-68., 71-73.
[58]decision22/2019. (VII. 5.) AB 110.
[59]decision22/2019. (VII. 5.) AB 113-116.
[60]decision22/2019. (VII. 5.) AB 121-127.

the minister. The safeguards[61] are also proper to exclude the overbroad ministerial margin of decision on personal matters, and on the promotion of judges.[62]

It is not worthy, that when this Constitutional Court ruling has been delivered; it was still questionable, whether this would be really significant, as the Government announced in May 2019 the postponement of the controversial reform until further decisions. Therefore, the Constitutional Court confirmed the constitutionality of a system, which perspectives were uncertain, and later it turned out, that this decision was not relevant practically at all, at least in the short term. Nevertheless, the principles set out by the reasoning of this judgement could orient the legislation for future references, when the reform of administrative justice would be concerned.

4.4. The postponement and the cancellation of the envisaged administrative justice reform

It surprised the public opinion, that in May 2019, during the campaign of the 2019 European Parliamentary elections, the Hungarian Government announced that the establishment of the separate branch of administrative justice has been postponed until an undetermined date.[63] No specific reasons of this step were provided, it is just probable, that the mostly hostile international surrounding and the actual political circumstances resulted this withdrawal. Several objections were made for the reform plans in a number of European forums, and also the European People's Party threatened the major Hungarian governmental party, the FIDESZ with exclusion from its faction. The Hungarian leaders aimed to conclude a compromise to reduce the tensions within the European People's Party during an electoral campaign period, which would have been harmful even for the European People's Party, and the FIDESZ.

Since the Constitutional Court upheld the whole administrative justice reform in its form after the amendments in March 2019, everyone waited for the introduction of the new system in January 2020. However, another unexpected twist changed again the situation: the Hungarian minister of justice informed the public from cancelling the whole administrative justice reform, probably due to the mostly critical domestic and international feedback. According to the official justification, the judicial system shall be protected from unnecessary disputes, and

[61] Act CXXX. of 2018. in Hungary on the administrative tribunals 29-33. §.
[62] decision22/2019. (VII. 5.) AB 128-136.
[63] Act LXI. of 2019. in Hungary on postponing the entry into force of the Act on administrative courts.

the reform generated such a discussion.[64] Although these points, the Government considered it still necessary to reshape the contours of administrative justice, therefore, further measures were also recommended, as will be analysed in the next two subchapters.

4.5. The amendment of the act on the Constitutional Court in December 2019.

After the second failed attempt to reformthe administrative justice, In December 2019 the Hungarian Parliament passed a series of bills, which amended several acts regarding also the functioning of the public administration, and the status of the judiciary, amongst others, the act on the Constitutional Court was also concerned.

The new acts brought four such main novelties, which affects at least indirectly the status of administrative justice. Firstly, the first instance appeal against an administrative decision was abolished, and instead of this, a two-level judicial review process has been created, which is slower, and more expensive, than the administrative path.[65] This step would enhance the significance of the administrative tribunals, as these courts shall hear legal controversies in an earlier stage, than under the previous system.

Secondly, another amendment stipulates, that after the termination of their mandate, the former members of the Constitutional Court may request their nomination to the Curia (High Court of Hungary) as council leader judges, if the former constitutional judge complies with all the requirements set by the law for judicial appointments.[66]It was rumoured, that such a system would weaken separation of powers with direct personal link between the Constitutional Court and the Curia. From the other side the professional experience was highlighted, which these people could bring to the Curia after their service at the Constitutional Court.

Thirdly, the amendment provides a more precise and detailed description of involvement in case of constitutional complaints against court judgements. The complainant shall be considered as involved, if he/she/it had standing at the judicial process;he/she/it is affected

[64] 'Hungary abandons plan for administrative courts, justice minister says' (*Reuters,* 01 November 2019)https://www.reuters.com/article/us-hungary-courts/hungary-abandons-plan-for-administrative-courts-justice-minister-says-idUSKBN1XB3KSaccessed 21 June 2020
[65]Act CX. of 2019. in Hungary.
[66]Act CXXVII. of 2019. in Hungary, Art. 55. (1) and (2).

directly by any provision of the court judgement; or his/her/its rightsorduties are influenced by the contested court judgement.[67]

Fourthly, the new legislation reconsiders the concept of constitutional complaint remarkably, as it opens up the possibility for public authorities to submit such initiatives to the Constitutional Court, not only for the protection of their fundamental rights, but also their constitutional and statutory competences.[68]This approach is based on the recent practice of the Hungarian Constitutional Court, which has already vested certain state authorities, such as the National Bank with standing to submit constitutional complaints.[69] This idea invigorated the discussion on constitutional complaint during the last months in Hungary, several arguments and counterarguments have been raised.

The Government and the supporters of the amendment explicate, that constitutional complaint shall be a safeguard of the fundamental rights of all legal entities, therefore, public authorities should be also included within this concept as potential initiators. For instance, right to fair trial may be a regular ground of remedial requests submitted by state authorities.[70]

By contrast, according to the opposing views, constitutional complaint against court judgements is such a legal instrument, which targets the protection of individuals against the state, therefore, public authorities shall be excluded from this opportunity. It is dogmatically false, that such entities, which exercise public power; have fundamental rights, and it is also possible, that this new circle of initiators would spreadthe Constitutional Court with their irrelevant complaints against court judgements. Moreover, the preservation of certain statutory competences falls outside even from the broadest acceptable interpretation of constitutional complaint.[71]

The amendment in December 2019 was adopted as a replacement of the broader administrative justice reform, but the whole saga has not been still ended as the next subchapter will demonstrate.

[67]Act CXXVII. of 2019. in Hungary, Art. 55. (3).
[68]Act CXXVII. of 2019. in Hungary, Art. 55. (3) and (4).
[69]decision 23/2018. (XII. 28.) AB
[70]Balázs Orbán, 'A magyarok jogainak és szabadságának védelmében' [In defense of therights and freedoms of the Hungarians] (*Index,* 25 November 2019) https://index.hu/velemeny/2019/11/25/orban_balazs_velemenycikk_alkotmany_feladata_vita/accessed 21 June 2020
[71]Dániel Karsai, 'Kié az Alkotmánybíróság?' [Who dominates the Constitutional Court?] (*Index,* 05 December 2019) https://index.hu/velemeny/olvir/2019/12/05/kie_az_alkotmanybirosag/accessed 12 May 2020

4.6. The establishment of the separate administrative judicial division

After the removal of the originally prepared reform package, the Government continued the work towards two main directions. One of them was the amendment on certain acts concerning the judiciary in December 2019 and in parallel, the other was the dissolution of the separate administrative and labor courts. Instead of this solution, a unitary judicial system was outlined, within that;a separate administrative branch should have been set u pin eight county courts of the country.[72] Against the judgements of these courts, an appeal might be lodged to the Curia. The establishment of these divisions was scheduled on 1 April 2020 but after the outbreak of the coronavirus pandemic, it was again uncertain, whether this exceptionally long story could step forward. Despite the extra-ordinary circumstances, the Government confirmed its intention to set up the new framework of administrative justice, which started to function on the originally allocated date.

5. The main experience of the two proposed administrative justice reformsin Hungary

The recent history of the Hungarian administrative justice system demonstrates excellently the populist vision of judicial review over administrative decisions. This approach emphasises a stronger executive supervision over the administrative tribunals: the minister of justice could make certain decisions in cooperation with the judicial self-governing bodies, but the later should be wested with effective powers as counterbalances against the ministerial competences. However, it is contestable, what is meant by the effective participation of judicial self-governing bodies in the decision-making processes. The professional work of the administrative tribunals shall be fully independent, but these entities are maintained from public money, therefore, the executive might have even strong competences in financial matters.

A further point is, that the populist approach considers administrative justice as an inherent value, which could serve the effective, and professional review of administrative decisions. The judicial treatment of administrative matters need such a special knowledge, and these cases have such specialities, which provide a proper basis to establish a separate branch of the judiciary to hear these controversies.

[72]Act CXXVII. of 2019. in Hungary, Art. 61. § and 63. § (6).

The two reform attempts shortly after each other also embodied that populist attitude, which does not respect the stability of the legal system, would lead to a continuous reorganization of administrative justice.[73]It may depend on the personal preferences, which model is seen as thebest to organize judicial review over administrative decisions, but it is beyond doubt, that the rapidly changing legal environment could not serve predictability and legal certainty.

The main lesson from the Hungarian sample is that such a crucial segment of the state, as administrative justice should be reorganised only after inclusive and deep professional discussion on the ground of long-term strategies.[74] Since administrative justice may concern the fundamental rights of everyone, if this judicial branch is changed frequently, public confidence may be undermined, which would be perceptible in all fields of our life.

Conclusion

So what we could say as a concluding remark about the recent Hungarian administrative justice reform? It was the great possibility of the Hungarian administrative justice, or a merely politically motivated project to undermine the independent administrative justice in Hungary? Obviously, the answer would be complex, as administrative justice was really a contested matter in Hungary from the democratic transition. As several models of administrative justice have been applied in Hungary during the last one and a half century, it was a real demand to find the most suitable framework for this branch of judiciary. The issue was the lack of clearly elaborated ideas and aims, which lead to insufficient preparation, and a huge number of contested issues around the reform attempts. These events also showed, that it is at least really difficult to identify an European standard of administrative justice, a broad range of different solutions exist in the diverse countries. Our aim was not to provide an exclusive framework for administrative courts, but to conceptualize the conflicting arguments and to demonstrate, how the populist view of this matter varies from the traditional approach. The Hungarian experience might not be concluded at the current stage, further development may also arise. The analysis of theseand also potentially forthcomingreform attempts may be relevant not only for Hungary, but also for other countries to avoid similar, ill-considered endeavours in the field of administrative justice.

[73]KÜPPERHerbert: „Magyarország átalakuló közigazgatási bíráskodása”[Hungary's changing administrative judiciary]*MTA Law WorkingPapers*2014/59. https://jog.tk.mta.hu/hungarys-changing-administrative-justice
[74]MUDRÁNÉ LÁNG Erzsébet: „A közigazgatási bíráskodás egy bíró szemével” [Administrative justice with the eye of a judge]In: BARTÓK Flóra: *Contributions*, 126-139. (citedabovefn.:7).